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No. 32

# In the Supreme Court of the United States

*October Term, 1930.*

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

*vs.*

FITZSIMMONS DRILLING COMPANY, INCORPORATED, A CORPORATION, AND ATLANTIC OIL PRODUCING COMPANY, A CORPORATION, *Respondents.*

## Brief of Respondents in Opposition to Petition for Writ of Certiorari.


GEORGE F. SHORT,
Oklahoma City, Oklahoma,
HORACE H. HAGAN,
Tulsa, Oklahoma,
*Attorneys for Respondent, Atlantic Oil Producing Company;*

HAL C. THURMAN,
Oklahoma City, Oklahoma,
RAY S. FELLOWS,
Tulsa, Oklahoma,
*Attorneys for Respondent, Fitzsimmons Drilling Company, Inc.*

*Of Counsel:*
T. AUSTIN GAVIN,
THOMAS R. FREEMAN,
JOSEPH A. GILL, JR.

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IN THE SUPREME COURT OF THE UNITED STATES.

*October Term, 1930.*

No. 790

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

*vs.*

FITZSIMMONS DRILLING COMPANY, INCORPORATED, A CORPORATION, AND ATLANTIC OIL PRODUCING COMPANY, A CORPORATION, *Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

Petitioner seeks a writ of *certiorari* on the ground that the holding of the Circuit Court of Appeals for the Tenth Circuit is in conflict with other federal appellate court decisions. The syllabus of the decision, which forms the basis of petitioner's complaint, is as follows:

> "*(1)* 'That where an administrator prosecutes an action for damages for wrongful death under the statutes of Oklahoma for the use and benefit of the next of kin of said deceased, that the administrator is a mere formal or nominal party and the citizenship and residence of the administrator should be disregarded, and

only the residence and citizenship of the beneficiaries, or next of kin, should be taken into account in determining the jurisdiction of a United States District Court.'

"(2) 'That although the probate statutes of the State of Oklahoma authorize the appointment of a non-resident administrator, that where several suits have been filed and dismissed and the purpose of having a foreign administrator appointed is to defeat the jurisdiction of a United States District Court and keep a case from being removed from the state to the federal court on the ground of diversity of citizenship, that the court would not permit this to be done, to avoid a removal'."

Respondents submit that neither of the two propositions decided and complained of by petitioner in this proceeding is in conflict with the holding of any other Circuit Court of Appeals or of the Supreme Court of the United States.

Inasmuch as the petition for a writ of *certiorari* raises two questions, respondents' answer brief is also divided into two parts, the first dealing with that holding of the Circuit Court of Appeals, which is condensed in the first paragraph of the syllabus of its opinion quoted above, and the second part having to do with the proposition decided by said court as summarized in the second paragraph of the syllabus of such opinion.

Petitioner states at the bottom of page six of his petition for a writ of *certiorari*, that a correct answer to the following question:

"In determining the jurisdiction of a United States District Court on the ground of diversity of

citizenship, whose citizenship and residence should govern where an administrator is a party to the suit—the administrator's residence and citizenship or the citizenship and residence of the beneficiaries or next of kin?",

will dispose of both propositions decided by the Circuit Court of Appeals in the case at bar. In saying in effect that "one question is involved," that quoted above, petitioner does not take into account *the differences in the kinds of action brought, nor the differences in the statutes under which the actions are brought, nor the element of wrongful deprivation of federal jurisdiction by collusion or fraud.*

Herein lies the fundamental difference between the positions of petitioner and respondents.

Respondents maintain that two questions are presented as follows: *First.* In an action brought under sections 824 and 825 of the Compiled Oklahoma Statutes of 1921, by an administrator for the use and benefit of the widow and children of his decedent, to recover damages for the death of such decedent, should the residence of the administrator or that of the widow and children govern in determining the jurisdiction of a United States District Court? And, *Second.* Were the acts here involved sufficient to show a collusive or fraudulent attempt to deprive the United States District Court of its rightful jurisdiction, and if so, what would be the effect of such acts? If either of these questions should be decided by this court in the same way as it was decided by the Circuit Court of Appeals, then the ultimate outcome of this case would be the same as if a writ of *certiorari* had never been sought.

## Statement of Facts.

Before the submission and discussion of authorities, supporting the propositions above mentioned, respondents respectfully direct the attention of the court to the fact that the petitioner, in his statement of the case, omits to disclose that, prior to the institution of the present suit, three other actions for the same relief had been successively instituted by Lillian Smith, the widow of the decedent, who had been appointed as his administratrix by the County Court of Pawnee County, Oklahoma. As said widow and administratrix was a citizen of Oklahoma, and as the defendant Fitzsimmons Drilling Company was a resident of Louisiana, and the defendant Atlantic Oil Producing Company a resident of Delaware, each of these actions was removed to the proper federal court, and each, in turn, was dismissed by the plaintiff when she was unsuccessful in having it remanded. Two of these actions were removed to the United States District Court for the Western District of Oklahoma, and the other was removed to the United States Court for the Northern District of Oklahoma, since it, unlike the other two, was filed in a county within the jurisdiction of that court. (See record of proceedings on motion to remand at p. 43 of transcript of record.) It was after the dismissal of these suits that counsel for the widow conceived and executed the plan of having her resign as administratrix and having William H. Mecom, a resident of Louisiana, appointed in her place, and then bringing a fourth suit in the name of such foreign administrator in order that removal to the national court might be resisted on

the ground that said administrator and defendant Fitzsimmons Drilling Company were both residents of Louisiana. The facts relative to the suit brought within the jurisdiction of the United States Court for the Western District of Oklahoma, and the facts with respect to Mecom's appointment and his connection with this litigation, are thus stated in the opinion of the Circuit Court of Appeals:

"Shortly after the death of Smith his widow was appointed administratrix and she brought an action against the defendants in the state court alleging she and the two children as beneficiaries had been damaged in a very large amount. The defendants removed that case to the federal court and the plaintiff being unsuccessful on her motion to remand dismissed her action and shortly thereafter instituted another action like the first. This went through the same procedure as the first case. Thereafter, she resigned, as administratrix and one William H. Mecom, a citizen and resident of the State of Louisiana was appointed administrator by a probate court of Oklahoma. He then brought a like action in the state court. It was removed to the federal court. That court refused to remand it. The plaintiff dismissed and then he brought this action in the state court, in which, as in the prior cases, he embodied two counts. In the first count he alleged that he sues for the use and benefit of the widow and two minor children and asks damages in the sum of one hundred thousand dollars. In the second count he alleged deceased was conscious from the time he was injured until he died and on account of his injury suffered bodily pain and mental anguish from the time he was injured until he died, and prayed damages in the sum of three thousand dollars therefor. The case was removed to the federal court and on the court's refusal to remand it went to

trial and resulted in favor of defendants. Appellant comes here assigning error that the court overruled his motion to remand to the state court.

"The grounds for the removal of the case from the state to the federal court were, *first*, diversity of citizenship, and *second*, a fraudulent intent and purpose on the part of Mrs. Smith and her attorney and the present plaintiff to defeat federal jurisdiction. Adverting to the last point, it appears that the resignation of Mrs. Smith and the appointment of Mecom in her stead was solely the act of her counsel who brought the prior suits and this one. He wrote to Mecom asking him if he would accept such appointment. Mecom did not come to Oklahoma but signified his willingness to accept the appointment solely as an accommodation. When he was appointed the attorney for plaintiff signed the required oath and appointed Mrs. Smith as his resident agent. He did not sign the petition for his appointment as administrator nor the required bond. His name was signed to the petition and bond by counsel for the plaintiff in this case who had brought the prior suits for Mrs. Smith. He had nothing further to do with the estate of deceased and received no information about the estate. He gave no direction about the commencement of this or any other suit. He had no information about any litigation in which the estate might be interested and was in no way related to the deceased. So far as he could learn, the deceased left no estate in the State of Louisiana. He acted in the matter merely to accommodate Mrs. Smith's attorney."

These statements of the Circuit Court of Appeals are supported by the record of the evidence and proceedings had at the time of the hearing on petitioner's motion to remand this cause (R. 42-47); and are also reflected by re-

spondents' petition for removal (R. 9-23). The order overruling said motion to remand recites that it was heard on

> "the evidence offered, consisting of the proceedings in the matter of the estate of Archie Lee Smith, deceased, in the County Court of Pawnee County, State of Oklahoma, and the deposition of William H. Mecom and the affidavits attached to the response to the motion to remand and the verified transcript of the proceedings before Honorable Wyley Jones, Judge of the District Court in and for Oklahoma County, State of Oklahoma, and the agreement of the parties that the petition for removal contained a true and correct statement of the proceedings in the several prior actions to recover damages for the death of Archie Lee Smith, deceased * * *" (R. 33-34)

## Division One.

### The Holding of the Circuit Court of Appeals as Condensed in Its First Syllabus.

Petitioner contends that the Circuit Court of Appeals for the Sixth Circuit, in the case of *Cincinnati H. & D. R. Co.* v. *Thiebaud*, 114 Fed. 918, has decided the first question involved in this case oppositely to the decision in the present case. That was a suit brought by Thieband as administrator of Sweetman, against the defendant railroad company to recover damages arising from the death of deceased and occasioned by the negligence of the company. The right of the administrator to bring such an action was founded upon a statute of Indiana, where the accident and death occurred, which provided:

> "When the death of one is caused by the wrongful act or omission of another, the personal representative

of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter, for an injury for the same act or omission. * * * The damages * * * must inure to the exclusive benefit of the widow and children, if any, or next of kin, and be distributed in the same manner as personal property of the deceased."

Thus, it will be observed that the Indiana statute unlike the Oklahoma statute (page 9, petitioner's brief), gave the right of action only to the administrator and did not provide that, under any circumstances, action might be maintained by the widow and children, if any, or next of kin. The court, in its opinion said:

"The statutes in the several states providing a remedy for the benefit of the family, or next of kin, of the deceased who dies from the wrongful act of another, differ in the mode by which it is accomplished and it is merely the effects of the subject we are considering. In some a remedy is given directly to the beneficiaries. Such is the law of Tennessee which was involved in the case of *Railway Company* v. *Hooper*, 92 Fed. 820, which came to this court from that state. There, either the administrator or the beneficiaries may sue. In others the right of action is devolved upon his personal representative. * * * The Indiana statute provides that the administrator may maintain an action if the deceased, had he lived, might have maintained an action for the same cause. The damages, when collected, are distributed to the family, or next of kin. *It is obvious that the beneficiaries cannot bring the action.* They have only the right to ultimately receive the proceeds when the administrator shall have executed his trust."

The case of *Atlanta K. & N. Ry. Co.* v. *Hooper*, 92 Fed. 820, decided by the Court of Appeals for the Sixth Circuit,

and distinguished in the case of *Cincinnati H. & D. R. Co.* v. *Thiebaud, supra,* relied on by petitioner, was an action brought by an administrator, under the statutes of Tennessee, for the wrongful death of his intestate. The pertinent sections of the Tennessee statutes are set out in the opinion. They provide that the right of action in a case of this sort shall pass to the widow of the decedent and in case there is no widow, to his children, or to his personal representative for the benefit of his widow or next of kin. Such statutes further provide that the action may be instituted by the personal representative of the deceased, but if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit. Such statutes also provide that the action may be instituted by the widow in her own name, or if there be no widow, by the children. The Circuit Court of Appeals for the Sixth Circuit, in that case, said in its opinion:

> "It is settled by the decisions of the Supreme Court of Tennessee that no action can be maintained by an administrator of a deceased person under the foregoing sections unless there shall be in existence persons for whose benefit the right of action is given and that a declaration drawn under these sections which does not set forth the person for whose benefit the suit is brought, is fatally defective. *Railway Company* v. *Lilly*, 90 Tenn. 563, 18 S. W. 243; *Railroad Co.* v. *Pitt*, 91 Tenn. 86, 18 S. W. 118. *The next of kin for whose benefit the suit is brought are the real plaintiffs and the administrator though dominus litis, and a necessary party in all cases where there is no widow or child of the deceased, is, nevertheless, but a nominal party and a mere trustee.*" (Italics ours.)

The case of *Popp* v. *Cincinnati H. & D. Ry. Co.*, 96 Fed. 465, referred to by petitioner, is not a decision of an appellate court and for this reason probably should not be considered upon the petitioner's application for writ of *certiorari*. However, it does not appear that the statute of Ohio, which was involved in that case, provided that an action for wrongful death might be maintained under any circumstances by any one other than the administrator or personal representative of the deceased.

It is the contention of respondents that sections 824 and 825 of the Compiled Oklahoma Statutes for the year 1921, which are set out at page 9 of the brief in support of petition for writ of *certiorari*, are not the same as the "wrongful death" statute of the State of Indiana, under which the case of *Cincinnati H. & D. Ry. Co.* v. *Thiebaud* was decided, differing from such statute in that in Oklahoma an action for "wrongful death" may be brought also by the widow, or where there is no widow, by the next of kin of the deceased, where no personal representative is, or has been, appointed, or where the residence of the deceased at the time of his death was in any other state or territory. The Oklahoma statute, therefore, is, as far as the instant question is concerned, more nearly like that of Tennessee under which the case of *Atlanta K. & N. Ry. Co.* v. *Hooper, supra*, was decided, than it is like the Indiana statute involved in the case of *Cincinnati H. & G. Ry. Co.* v. *Thiebaud, supra*.

The only federal decision which passes on the question of whose citizenship governs in a case of "wrongful death" brought under the Oklahoma statute, whether that of the

administrator or that of the widow and children of deceased, in determining the jurisdiction of a United States District Court, is the case of *Carter* v. *St. Louis & S. F. Ry. Co.*, 29 Fed. (2d) 628, decided by the District Court for the Northern District of Oklahoma, on December 12, 1928, and holding that the widow and children of the decedent are the real parties in interest in an action brought by an administrator under the Oklahoma "wrongful death" statute, and that their citizenship and not that of the administrator controls on the question of diversity of citizenship. Neither the Circuit Court of Appeals of any district, nor the Supreme Court of the United States, had passed upon the Supreme Court of the United States, has passed upon this question under the Oklahoma statute. How, then, can there be a conflict among the opinions of the several Circuit Courts of Appeals when there has never been any decision rendered upon the subject by them?

Petitioner also cites two cases, each one brought by the administrator of a deceased person to recover damages for the death of the decedent caused by the negligence of the defendant, and in which the jurisdiction of the federal court was involved, such cases being:

*Memphis Street Ry. Co.* v. *Moore*, 243 U. S. 299, 61 L. ed. 733;

*Patch* v. *Wabash R. R. Co.*, 207 U. S. 277, 52 L. ed. 204.

In *Memphis Street Ry. Co.* v. *Moore, supra*, Moore, a citizen of Arkansas, had been appointed administrator by the Probate Court of Shelby County, Tennessee, and

brought suit in the United States District Court for the Western District of Tennessee against the Memphis Street Ry. Company, a citizen of Tennessee, on the ground of diversity of citizenship. The only question involved and presented to the court was the contention of the defendant that Moore, although a citizen of Arkansas, must be treated as a citizen of Tennessee, under the statutes of Tennessee, providing that:

> "Wherever a non-citizen of the State of Tennessee qualifies in this state as the executor or administrator of a person dying in, or leaving estate or property in this state, for the purpose of suing and being sued, he shall be treated as a citizen of this state."

The United States Supreme Court held that it was bound by a decision of the Supreme Court of Tennessee construing this statute and holding that its sole purpose was to extend to non-resident executors and administrators the privilege of suing in the state courts *in forma pauperis*, and that, therefore, the act did not take away from a non-resident administrator or executor the right to invoke the jurisdiction of the United States court in a suit against a resident of Tennessee. In this case it was assumed by the parties, and the court, that in the absence of such statute the courts of the United States would have jurisdiction and the opinion does not mention the residence and citizenship of the widow and children of the decedent, if any.

In *Patch* v. *Wabash Railroad Co., supra*, suit was filed in a state court of the State of Illinois. Defendant petitioned for removal, alleging that defendant was a citizen of Ohio and plaintiff was a citizen of Illinois. The case was

removed. In the federal court plaintiff filed a plea to the jurisdiction, alleging that defendant was a corporation organized and existing under the laws of Illinois, and several other states, and, therefore, a citizen and resident of Illinois and each of the other states where incorporated. Defendant demurred to such plea. The demurrer was sustained and as plaintiff elected to stand on the plea, judgment was rendered against plaintiff for costs. The United States Supreme Court held that the plea to the jurisdiction was good because defendant should have been regarded as a citizen of Illinois. In this case it was the citizenship of the defendant that was in question and not the citizenship of the plaintiff.

Consequently, neither the decision in *Memphis Street Ry. Co.* v. *Moore, supra,* or that in *Patch* v. *Wabash R. R. Co., supra,* is controlling, or persuasive, of the questions involved in the case at bar. In neither of these two cases was it determined whether under a "wrongful death" statute, such as that of Oklahoma, the residence of the widow, or children of decedent, or the residence of the administrator of the estate of decedent should govern in determining jurisdiction of the federal courts in an action authorized by such statute.

Petitioner cites, also, two cases, each of which was brought by the guardian of a minor to recover damages for injuries sustained by the minor, namely, *City of Detroit* v. *Blanchfield,* 13 Fed. (2nd) 13, and *Mexican Central Railway Co.* v. *Eckman,* 187 U. S. 429, 23 S. Ct. Rep. 211, 47 L. ed. 244. In the very nature of things, neither of these

cases could be applicable, because neither involves a statute similar to sections 824 and 825 of the Compiled Oklahoma Statutes of 1921, and neither of these cases is brought by an administrator. Each of them was brought by the guardian of a minor, who was entitled to have and hold possession of the entire assets of the ward. Neither of them sought to recover damages because of death by wrongful act. The first cited involved the laws of Michigan, and the second the laws of Mexico, in respect to the causes of action sought to be enforced.

In may be argued, with perhaps equally as much force, that the cases holding that it is the citizenship of the infant, and not that of his next friend, in a suit brought by a person, who is the next friend of an infant, which governs in determining diversity of citizenship for the purpose of ascertaining federal jurisdiction, are applicable here, as it is argued on behalf of petitioner that the guardianship cases such as *Mexican Central Ry. Co.* v. *Eckman, supra,* are applicable. The "next friend" cases are all alike. There does not seem to be the slightest doubt but that it is the residence of the infant and not that of the next friend which governs in this matter. The rule is recognized by text writers, cyclopedists and the courts. In support of this rule are the following cases:

*Wiggins* v. *Bethune,* 29 Fed. 51;

*Voss* v. *Neineher,* 68 Fed. 947;

*Blumenthal* v. *Craig,* 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 320.

Section 211, Compiled Oklahoma Statutes of 1921, providing that:

> "An * * * administrator * * * may bring an action without joining with him the person for whose benefit it is prosecuted.";

cited by petitioner, is entirely procedural, and does not and could not affect the matter of the jurisdiction of the United States District Court.

The Supreme Court of the United States in the case of *Stewart* v. *Baltimore & Ohio Railroad Company*, 168 U. S. 445, 42 Law. ed. 537, in an action brought by the administrator of a deceased person to recover damages for the death of decedent, caused by the negligence of defendant, has recognized that in determining jurisdiction of the federal courts regard is had of the residence of the wife (the wife in this case being the only heir of decedent) rather than that of the administrator. The court, in the last mentioned case, in discussing the respective statutes of Maryland and the District of Columbia, the cause of action having risen in the State of Maryland and the action itself having been brought in the District of Columbia, said:

> "The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the state; in this District the personal representative of the deceased. But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the district the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the de-

ceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative.

"For the purposes of jurisdiction in the federal courts regard is had to the real rather than to the nominal party. *Browne* v. *Strode*, 9 U. S., 5 Cranch. 303 (3:108); *M'Nutt* v. *Bland*, 43 U. S., 2 How. 9 (11:159); *State of Maryland, for Use of Markley*, v. *Baldwin*, 112 U. S. 490 (28:822). See, also, *Gaither* v. *Farmers & Mechanics Bank of Georgetown*, 26 U. S., 1 Pet. 37, 42 (7:43, 45), in which the issue submitted to the jury was, as stated, one between the bank to the use of Thomas Corcorrak, plaintiff, and Gaither, the defendant, upon which the court said: 'This practice is familiar with the Maryland courts, and when the action originates in that form; the *cestui que* use is regarded as the real party to the suit.' It is true those were actions on contract, and this is an action for a tort, but still in such an action it is evident that the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party."

In the case of *New York Evening Post* v. *Chaloner*, 265 Fed. 204, a committee (under the laws of the State of New York) was substituted as party plaintiff in lieu of the original party plaintiff, who had been adjudged insane and for whom the committee (standing in place of a guardian) had been appointed. It was there held that the residence of the representatives (the committee), who were vested with the exclusive right to enforce the claim and invest or use the

proceeds for the benefit of the ward, governed in determining jurisdiction of the federal court, rather than the residence of the ward. An administrator was not a party plaintiff. Neither was a death statute involved similar to the one in the case at bar. The case was one to recover damages for libel.

In the case of *New Orleans* v. *Whitney*, 138 U. S. 595, 11 Sup. Ct. Reporter 428, 34 Law. ed. 1102, while an administrator was a party plaintiff, the action was not brought under a "wrongful death" statute, but was for the purpose of recovering rents, revenues and profits from a certain quantity of land as assets of the estate involved, against the City of New Orleans as defendant. It could not, therefore, be in point.

In the case of *McNutt* v. *Bland*, 2 How. 9, 11 Law. ed. 159, it appears from the opinion that under the laws of Mississippi, sheriffs are required to give bond to the governor of the state for the faithful performance of their duty, and suit on the bond must be brought in the name of the governor of the state for the use of any person damaged by the acts or omissions of the sheriff. Suit was brought in the name of McNutt, Governor of Mississippi, for the use of citizens of New York, against Bland, the sheriff, and Benjamin G. Humphreys, his surety, both of whom were citizens of Mississippi. It was contended by the defendants that the federal court had no jurisdiction because the plaintiff, McNutt, as well as both defendants, were citizens of Mississippi. The United States Supreme Court, in an opinion by Mr. Justice BALDWIN, held that the federal court had jurisdiction on the ground of diversity of citizenship be-

tween the real parties in interest, holding that the governor was a mere naked trustee for any injured party, and saying:

"He is a mere conduit through whom the law affords a remedy to the person injured by the act or omissions of the sheriff; the governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity, which right could not be contested in a suit in a state court of Mississippi, nor in a Circuit Court of the United States, in any other mode of proceeding than on the sheriff's bond.

"It would be a glaring defect in the jurisprudence of the United States, if aliens or citizens of other states should be deprived of the right of suit on sheriff's bonds in the federal courts sitting in Mississippi, merely because they were taken in the name of the governor for the use of the plaintiffs in mesne or final process, who are in law and equity the beneficiary obligees; we think this defect does not exist. The Constitution extends the judicial power to controversies between citizens of different states; the 11th section of the Judiciary Act gives jurisdiction to the circuit courts, of suits between a citizen of the state where the suit is brought, and a citizen of another state. In this case there is a controversy and suit between citizens of New York and Mississippi; there is neither between the governor and the defendants; as the instrument of the state law to afford a remedy against the sheriff and his sureties, his name is in the bond and to the suit upon it, but in no just view of the Constitution or law can he be considered as a litigant party; *both look to things—not names—to the actors in controversies and suits, not to the mere forms or inactive instruments.*

*used in conducting them in virtue in some positive law.*" (Italics ours.)

In the case of *Maryland* v. *Baldwin*, 112 U. S. 490, 5 Supreme Court Reporter 278, 28 Law. ed. 822, the following facts were presented. Under the laws of Maryland, the bond of an administrator runs to the state and a suit on such a bond was brought in the name of the state for the benefit of non-residents and against resident defendants. The jurisdiction of the federal court was sustained on the ground that there was a diversity of citizenship between the party for whose benefit the suit was brought and the defendant. In the opinion by Mr. Justice FIELD, it is said:

"By the law of Maryland the bond of an administrator is taken to the state, but is held for the security of persons interested in the estate of the deceased. The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and, in such cases, the real controversy is between him and the obligors on the bond. If the residence of these parties be in different states, the Circuit Court of the United States has jurisdiction.

"A statute of Virginia in force in 1809 required bonds given by executors for the faithful execution of their duties to be made payable to the justices of the peace of the county where letters were issued, but allowed suits to be brought upon them at the instance of any party aggrieved; and in *Browne* v. *Strode*, 5 Cranch. 303, this court held that the Circuit Court of the United States for the district had jurisdiction of an action upon such a bond in the name of the justices of the peace for the use of a British subject, though the defendants were citizens of Virginia, the real controversy being between them and an alien.

"A statute of Mississippi in force in 1844 required sheriffs to execute bonds to the governor of the state for the faithful performance of their duties, which could be prosecuted by any party aggrieved, until the whole penalty was recovered. In *McNutt* v. *Bland*, 2 How. 10, an action was brought in the Circuit Court of the United States for the District of Mississippi in the name of the governor for the use of citizens of New York against defendants who were citizens of Mississippi, and on demurrer it was held that the Circuit Court had jurisdiction, the court observing that there was a controversy and a suit between citizens of New York and citizens of Mississippi, and there was neither between the governor and the defendants; that as an instrument of the state his name was on the bond and to the suit, but in no just view of the Constitution could he be considered as a litigant party. 'Both,' it added, *'look to things not names, to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them in virtue of some positive law.' The justices of the peace in the one case and the governor in the other were mere conduits through whom the law afforded a remedy to persons aggrieved, who alone constituted the complaining parties. So in the present case, the state is a mere nominal party; she could not prevent the institution of the action nor control the proceedings or the judgment therein. The case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned, as though Mackley was alone named as plaintiff; and the action was properly removed to that court."* (Italics ours.)

It is apparent that throughout all of the above cases, whether relied on by petitioner or respondent, the principal question in determining whether the residence of the nom-

inal plaintiff, or the residences of the beneficiaries under the cause of action shall govern, lies in the determination of whether or not the nominal party plaintiff has and is entitled to the actual control of the lawsuit which has been brought, and exercises such control.

The record in this case shows conclusively that the nominal plaintiff Mecom not only was without control of this litigation and had nothing to do with the employment of attorneys, the commencement of any action, or the giving of any security for costs, but did not, in fact, until May 31, 1929, four months after this action was commenced, even know that the estate or administrator had any right of action, or that any suit had been brought in his name. His relationship to this case was and is purely nominal, and theoretical, and has resulted from the action of the widow of the deceased and former administratrix and her attorney, in filing the "resignation of administratrix and request for the appointment of William H. Mecom, as succeeding administrator," and on the same day (as a matter of statutory right) procuring the appointment of Mecom, and by then dismissing the pending suit commenced by Mrs. Smith as administratrix, and then filing a new suit in the name of Mecom as administrator without his knowledge or consent. Consequently, any control which the nominal plaintiff, Mecom, administrator, has in connection with the instant lawsuit is purely theoretical and arises by virtue of a legal relationship, and does not have its basis in fact.

If title, right to, or the possession or use of any recovery in the instant case is to be considered in determining whether or not Mecom, administrator, is purely a formal party, and in determining whether or not his residence

shall govern as to jurisdiction, then the question here presented would be determined adversely to petitioner because of the holding of the Oklahoma Supreme Court in *Aetna Casualty & Surety Company* v. *Young*, 107 Okl. 151, 231 Pac. 261, wherein the first subdivision of the syllabus by the court is as follows:

> "Moneys recovered by the administrator of the estate of a deceased under the provisions of section 824, Compiled Oklahoma Statutes 1921, do not belong to the estate of the deceased, and the County Court has no jurisdiction over the administrator in the maintenance of said suit or the settlement of such claims or the distribution of such moneys. Damages recovered under said section belong to the next of kin as therein provided and are in compensation for the losses sustained by such kin on account of the death of the deceased."

This same case is authority for the proposition that if damages are recovered in a suit under the Oklahoma "wrongful death" statute, when such suit is brought by a personal representative, such representative can do nothing with the funds received as damages except to pay them over to the beneficiaries or heirs, under the statute. See, also, *St. Louis and S. F. R. Co.* v. *Goode*, 42 Okl. 784, 142 Pac. 1185, cited in the opinion of the Circuit Court of Appeals (R. 55).

Under section 1141, Compiled Oklahoma Statutes of 1921, which is in part as follows:

> "Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned and they are respectively entitled thereto, in the following order: *First*, the surviving husband or wife, or some competent person whom he or she may request to have appointed,"

the widow of decedent had the absolute right to be appointed administratrix of the estate of the deceased, or have some other person selected by her appointed as such, and the County Court of Pawnee County had no discretion in the matter. The County Court appointing a personal representative in Oklahoma, has no control of the personal representative or administrator in the commencement, prosecution or settlement of an action for wrongful death, or in the distribution of any damages recovered. Therefore, the widow in the present case, was in absolute control of the alleged cause of action at all times—as a matter of law as well as a matter of fact.

## Division Two.

### The Holding of the Circuit Court of Appeals as Condensed in the Second Syllabus.

First of all, as to point two of petitioner's brief, respondents' contention is that no federal appellate court has ever passed upon the question of whether facts similar to the ones involved in this case, will successfully deprive the federal courts of jurisdiction, and for this reason the petition for writ of *certiorari* should be denied.

It is settled that the fraudulent joinder, as plaintiff, or of a party whose citizenship is the same as the defendant, or as a defendant, of a party whose citizenship is the same as the plaintiff, will not be permitted to affect the jurisdiction of the courts of the United States on removal by the

real defendant whose citizenship is diverse from that of the real plaintiff.

—*Wecker* v. *National Enamelling & Stamping Co.*, 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. 35;

*Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92, 66 L. ed. 144, 42 Sup. Ct. 35;

*New Orleans* v. *Winter*, 1 Wheat. 91.

It is also established by the decisions that untrue allegations of fact made by plaintiff will not be permitted to deprive the courts of the United States of jurisdiction of an action against a defendant whose citizenship is diverse from that of the plaintiff.

—*Aldredge* v. *B. & O. R. Co.*, 20 Fed. (2d) 655 (C. C. A.);

*Hunter* v. *Illinois Cent. R. Co.*, 188 Fed. 645 (C. C. A.).

Where diversity of citizenship of adverse parties is brought about by collusion for the purpose of creating a case cognizable in federal court, such court will have no jurisdiction and the suit should be dismissed, and the rule is the same in all cases whether in contract or in tort.

—*Miller* v. *East Side Canal, etc., Co.*, 211 U. S. 293, 29 Sup. Ct. 111, 53 L. ed. 189;

*Lake Co.* v. *Dudley*, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. ed. 684;

*Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 16 Sup. Ct 307, 40 L. ed. 444.

Petitioner cites the case of *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 48 Sup. Ct. 404, 276 U. S. 518, 72 L. ed. 681. The court said in that case, [illegible]rring

to the succession of the Tennessee corporation to the property of its Kentucky grantor, that:

> "The succession and transfer were actual, not feigned or merely colorable. * * * In these circumstances the courts will not inquire into the motives when deciding concerning their jurisdiction. It is enough that respondent is the real party in interest."

Thus, the court decided that there was an actual transfer, but can that be said in the instant case? If so, it is only as a matter of theory.

In the case of *Southern Realty & Investment Co.* v. *Walker*, 211 U. S. 603, 29 Sup Ct. 211, 53 L. ed. 346, action was brought by a South Dakota corporation against a citizen of Georgia in a federal court sitting in the latter state. This action was dismissed as collusive, it being found that the South Dakota corporation was merely the agent of Georgia attorneys who brought it into existence as a corporation in order that individual citizens of Georgia having controversies with other individuals of that state, might in their discretion, have the use of its corporate name in order to create cases apparently within the jurisdiction of the federal court. It must be admitted that these interested parties had the statutory right to organize the Southern Realty & Investment Company under the law of South Dakota and that such corporation had the right to take deeds or assignments to lands in Georgia or interest therein, and would ordinarily have had the right to prosecute in the federal courts a cause of action against citizens of Georgia to recover such lands or interests. However, when these lawful things were done with the bad or wrongful purpose of simply enabling citizens of Georgia to avoid the juris-

diction of the state courts and to invoke the jurisdiction of the federal courts, the doing of the lawful things were held to constitute a collusive or fraudulent plan, scheme or artifice. It is the circumstances surrounding agreements or transactions and the motive, intent or purpose, which determine whether they are collusive or fraudulent. This case, it seems to us, completely answers the question asked by petitioner on page 19 of his brief.

In the instant case there is no collusion to confer jurisdiction on the federal court but it is the contention of respondents that the antithesis of the proposition that diversity of citizenship brought about by collusion in order to create a case within the federal court's jurisdiction is not sufficient to cause the federal court to retain jurisdiction, is true. In other words, federal jurisdiction cannot any more be avoided by collusion than it can be invoked by collusion.

This court has expressed itself upon this very question in the case of *Wecker* v. *National Enamelling & Stamping Co.*, 204 U. S. 176, at page 186 (51 L. ed. 430). It was there said:

> "While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right, *and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.*" (Italics ours.)

The case at bar presents a case of collusion between the widow of the deceased, who was the former administra-

trix of his estate, and her attorney and the plaintiff in this case, who was appointed administrator of the estate of decedent at the request of the widow and her attorney, upon the resignation of the widow as administratrix, solely to prevent the jurisdiction of the federal court.

The case at bar might be compared to that class of cases where it has been held that citizenship or domicile may not be changed by a party to a suit in order to give, or prevent, the jurisdiction of the federal court, unless the party in question makes such change of citizenship or residence in good faith and with the intention of residing in the new place of residence permanently or indefinitely. Where a person removes from one state to another for the sole purpose of enabling him to sue or be sued in the federal court, he does not thereby acquire a domicile or residence which will confer jurisdiction. This was held in the case of *Morris* v. *Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. ed. 690, and has been held in many other cases decided in the Supreme Court of the United States.

The case of *City of Detroit* v. *Blanchfield, supra*, cited by petitioner, contains some interesting passages on the question of collusion or fraud as affecting federal jurisdiction. In the course of the opinion, the court said:

> "Because of the constitutional limitations of the jurisdiction of federal courts, a different rule necessarily obtains in federal jurisdiction. Where the jurisdiction of a federal court is invoked upon the sole ground of diversity of citizenship, the action will be dismissed whenever it clearly appears that there is no such diversity of citizenship, or that the interest of a

nominal party to a suit is simulated and collusive, and created for the purpose of giving jurisdiction to a federal court. *Little* v. *Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. ed. 269; section 37, Judicial Code (Comp. St., Sec. 1019)."

The opinion in the same case in the very last paragraph says:

> "While, in a sufficiently clear case of collusion, it is the duty of the court to dismiss a case on its own motion, yet we think that *the rather casual admission by the guardian, near the close of the trial, that he supposes he was selected because he was an alien, does not make a clear enough case of fraud or collusion—if it be collusion at all—a question upon which we express no opinion, TO JUSTIFY DISPENSING WITH THE SAFER PRACTICE OF A SPECIAL ISSUE AND A TRIAL THEREOF.*" (Italics are ours.)

In the present case, it will be noted, there was a special issue upon the question of fraud and collusion, and a trial or hearing was had upon such issue. (See record, pages 42 to 47, and pages 9 to 23.) The practice suggested by the Circuit Court of Appeals for the Sixth Circuit in the *Blanchfield* case was followed in the instant case, thus properly raising the question of what the effect of such fraud and collusion should be.

It will be observed that none of the cases cited by petitioner, are cases wherein an administrator, or executor, was held to have been appointed fraudulently or collusively and apparently in none was the appointment of an administrator, or executor, attacked because it was fraudulent in so far as the jurisdiction of the federal court was concerned. Here again, although not an appellate decision,

is the case of *Carter* v. *Frisco*, decided by the United States District Court for the Northern District of Oklahoma, more nearly in point than any other of the cases cited—only in the case of *Carter* v. *Frisco*, the facts did not make out nearly so strong a case of collusion as is here presented.

Petitioner says that the petition for removal filed by defendants amounts to a collateral attack upon the judgment of the County Court in appointing the plaintiff Mecom as administrator of the estate of the deceased. Such is not the case, however. Respondents do not question the validity of the appointment of Mecom as administrator of the estate inasmuch as that is not involved on this hearing, nor has it been involved in the case in any of its stages. What respondents did contend, however, and what they now contend, is that any collusive appointment made as a result of an agreement between the widow of deceased, her attorney and the plaintiff Mecom, in order to defeat federal jurisdiction, will not be considered to affect, in any manner, the jurisdiction of the national courts. The appointment itself is not attacked. Respondents do assert and contend, however, that the appointment does not have any effect in changing the jurisdiction of the federal court, or in preventing the federal court from assuming jurisdiction to hear and determine the case at bar.

Attention is particularly directed to the case of *Cerri* v. *Akron-Peoples Telephone Co.*, 219 Fed. 285, because of the close similarity between the facts in that case and the one under consideration and because of the logic of the opinion therein. The opinion was written by Judge (afterwards Justice) CLARKE, and the case is thoroughly discussed in the

opinion of the Circuit Court of Appeals in the instant case. (See transcript, page 58.)

Respondents submit that it would be most difficult to find a case where a more flagrant device or artifice to prevent the jurisdiction of the United States Courts has been attempted, than was attempted in the case at bar.

## *Summary of Argument.*

For the foregoing reasons, therefore, respondents contend the decision of the Circuit Court of Appeals in the instant case is not in conflict with the decisions of any other Circuit Court of Appeals, or the decisions of this court.

## *Conclusion.*

It is, therefore, respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

GEORGE F. SHORT,
Oklahoma City, Oklahoma,
HORACE H. HAGAN,
Tulsa, Oklahoma,
*Attorneys for Respondent, Atlantic Oil Producing Company;*
HAL C. THURMAN,
Oklahoma City, Oklahoma,
RAY S. FELLOWS,
Tulsa, Oklahoma,
*Attorneys for Respondent, Fitzsimmons Drilling Company, Inc.*

*Of Counsel:*
T. AUSTIN GAVIN,
THOMAS R. FREEMAN,
JOSEPH A. GILL, JR.